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U.S. DEPT. OF JUSTICE

No. 151

**In the Supreme Court of the United States**

Between *[illegible]*

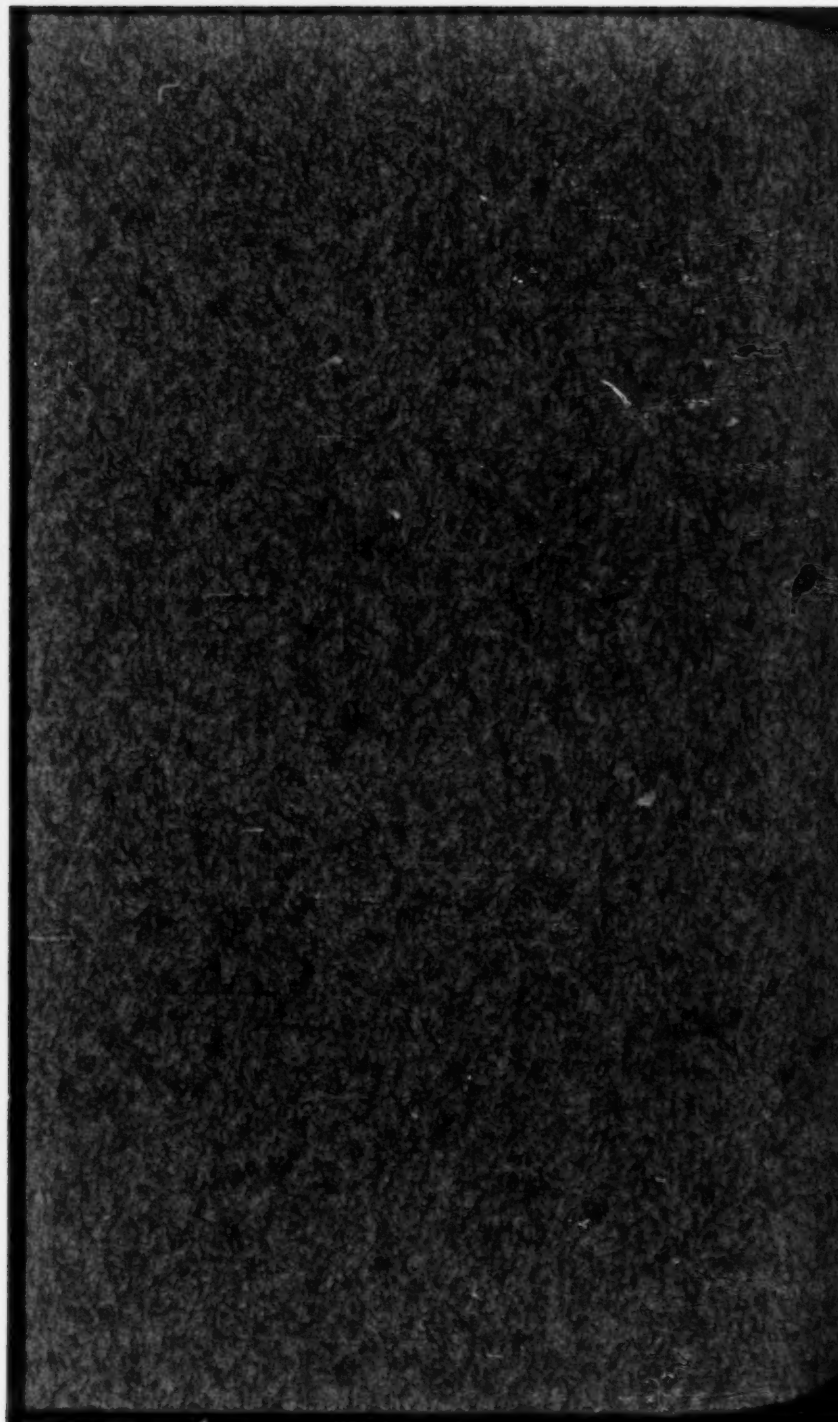
and *[illegible]*

Defendants.

ON PETITION FOR A WRIT OF HABEAS CORPUS  
STATE OF *[illegible]* vs. *[illegible]*  
CRIME

ALLIED with the *[illegible]*

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(i)



# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 751

L. J. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The majority (R. 32-36) and dissenting (R. 36-37) opinions in the circuit court of appeals have not yet been reported.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered October 16, 1944 (R. 37), and a petition for rehearing (R. 41-50) was denied November 14, 1944 (R. 51). The petition for a writ of certiorari was filed December 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

#### QUESTION PRESENTED

The sole question presented is whether the evidence is sufficient to sustain petitioner's conviction.

#### STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in part:

(a) No person shall \* \* \* possess  
\* \* \* any distilled spirits, unless the  
immediate container thereof has affixed  
thereto a stamp denoting the quantity of  
distilled spirits contained therein and evi-  
dencing payment of all internal-revenue  
taxes imposed on such spirits. \* \* \*

\* \* \* \* \*

(g) Any person who violates any pro-  
vision of this section \* \* \* shall on  
conviction be punished by a fine not exceed-  
ing \$1,000, or by imprisonment at hard  
labor not exceeding five years, or by both.  
\* \* \*

Section 2810 (a) of the Internal Revenue Code  
(26 U. S. C. 2810 (a)) provides:

Every person having in his possession or  
custody, or under his control, any still or  
distilling apparatus set up, shall register  
the same with the collector of the district  
in which it is \* \* \*. Stills and dis-

tilling apparatus shall be registered immediately upon their being set up.

\* \* \* \* \*

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of \$500, and shall be fined not less than \$100, nor more than \$1,000, and imprisoned for not less than one month, nor more than two years.

Section 2833 (a) of the Internal Revenue Code (26 U. S. C. 2833 (a)) provides:

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than \$100 nor more than \$5,000 and imprisoned for not less than thirty days nor more than two years. \* \* \*.

#### STATEMENT

Petitioner, Robert Cabe, and Sarah Ives were indicted in the District Court of the United States for the Eastern District of Oklahoma on five counts charging violations of the provisions of the Internal Revenue Code relating to (1) the possession, custody, and control of unregis-



tered stills and distilling apparatus (26 U. S. C. 2810) (R. 1-2); (2) conducting a distilling business without having given a bond as required by law (26 U. S. C. 2833) (R. 2); (3) working at a distillery upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law (26 U. S. C. 2831) (R. 3); (4) producing mash upon unregistered distillery premises (26 U. S. C. 2834) (R. 3-4); and (5) possessing distilled spirits in unstamped containers (26 U. S. C. 2803) (R. 4).

Cabe pleaded guilty to all counts (R. 5), the jury acquitted Ives (R. 5), and petitioner was convicted on counts 1, 2, and 5 (R. 5-6). Petitioner was sentenced to two years' imprisonment on each of these counts, the sentences to run concurrently, and fined \$100 each on counts 1 and 2 (R. 7, 8-9). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the conviction was affirmed (R. 32-36, 37), with one judge dissenting (R. 36-37).

The evidence adduced by the Government at the trial in support of the indictment is, in summary, as follows:

On October 8, 1943, internal revenue agents discovered an unlicensed still half full of mash upon premises which petitioner had leased in March 1943 for a period of one year from defendant Ives' father (R. 14, 16, 17, 18). Upon these premises and about 200 yards north from the site of the still were several out-buildings

and a two-room house, which had been occupied commencing in July 1943 by defendants Ives and Cabe and the former's children (R. 14, 18). Subsequent to their indictment in this case but prior to the trial petitioner and Ives were married (R. 18). Petitioner, who was engaged "on different business," in part in hauling and trucking, was "in and out" of the premises "from July on," and between August 1 and October 8, 1943, had been "there part of the time. \* \* \* Three or four times during those months" (R. 18).

Although no one was near the still when it was found by the agents (R. 14, 15), they found defendant Ives at the house and placed her under arrest (R. 14). When questioned at that time concerning the still, she denied any knowledge of it (R. 14, 17). Near the still the agents found a gallon jug half full of whiskey (R. 14) and several empty ten-pound sugar sacks (R. 15, 16). The whiskey "smelled like it was made out of syrup" (R. 14). Elsewhere upon the premises were found another jug partly filled with whiskey (R. 15, 16) and about 160 gallons of a "kind of white syrup" and several syrup buckets (R. 14, 17), while in a loft in the house were found about 108 gallon jugs containing nontax-paid "moonshine" whiskey (R. 14, 15, 16, 17). Outside the house was a Chevrolet automobile containing a pair of pants and shoes, and four ten-pound sacks of sugar (R. 14). The car and clothes were peti-

tioner's property, and the sugar had been transported by him to the premises (R. 15-16).

In defense, petitioner and defendant Ives offered their own testimony (R. 19-25), as well as the testimony of defendant Cabe and others (R. 19, 25-26). With reference to petitioner, the evidence was to the effect that he had leased the premises in question for the purpose of dealing in livestock, but that this venture proved unsuccessful and he had thereafter sublet the premises to defendant Cabe (R. 22, 24, 25); that petitioner then engaged in hauling lumber and feed for others (R. 22, 20, 23); that Cabe and Ives occupied the premises shortly before and at the time the still was found (R. 20, 22), but that petitioner was there only occasionally, while engaged on other business (R. 20, 21, 26); that Cabe alone had constructed the still about three weeks prior to its seizure, and had brought materials for the production of whiskey, operated the still, and handled the whiskey produced (R. 20, 21, 25-26; see also R. 22-23, 24, 25), and that petitioner did not participate in any of Cabe's activities in this respect (R. 23, 25);<sup>1</sup> that the sugar found in petitioner's car on October 8, 1943, was the property of Ives, who had obtained it from her sister in return for canning fruit for her and had brought it back on an occasion shortly before October 8

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<sup>1</sup> Cabe testified as to his activities in this connection, and both he and petitioner denied the latter's participation in them.

when petitioner had driven Ives to a physician (R. 20, 23, 26); that prior to that occasion petitioner's car had not been used to haul anything to the premises (R. 20-21, 23, 24); and that sugar was not used in the manufacture of whiskey at this still (R. 26).

On cross-examination of petitioner, the Government developed the fact that he had been convicted previously of various crimes, including crimes against the internal revenue and liquor laws (R. 24-25).

After the Government had rested (R. 18-19), and again at the close of the entire case (R. 26), petitioner moved for a directed verdict. The motions were denied (R. 19, 27).

In submitting the case to the jury, the court in part charged fully as to the presumption of innocence, the burden on the Government to establish its case beyond a reasonable doubt and the meaning of reasonable doubt, the fact that the Government here relied on circumstantial evidence and that "the facts and circumstances which point to the guilt of the defendant must be consistent with each other and inconsistent with any other reasonable hypothesis than that of guilt \* \* \*" (R. 27-30).

#### ARGUMENT

Petitioner asserts that there is not sufficient evidence to support his conviction and that the circumstantial evidence adduced is insubstantial and does not exclude every reasonable hypothesis

except that of guilt (Pet. 8-16).<sup>2</sup> There is no merit in these contentions.

While the evidence was entirely circumstantial, nevertheless, we submit, the trial court did not err in denying petitioner's motions for a directed verdict either at the close of the Government's case or at the close of the entire case. The evidence adduced by the Government, which we have summarized above (pp. 4-6, 7), indicated that

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<sup>2</sup> While petitioner argues (Pet. 8, 9-11) that the court below, in reviewing his conviction, did not follow "the rules announced by this Court" in *Clyatt v. United States*, 197 U. S. 207, and *Abrams v. United States*, 250 U. S. 616, and that "the record was not examined for the purpose of determining whether or not at the close of the Government's case and again at the close of the whole case there was competent and substantial evidence, fairly tending to sustain the verdict" (Pet. 10), petitioner's position plainly is not predicated upon any conflict in the holding in these cases with the holding here, but resolves itself merely into an attack upon the substantiality of the evidence. And upon his own admission that the court below stated in its opinion that "the evidence is found to be legally sufficient" (Pet. 10; see R. 36), and upon examination of the opinion as a whole, it is evident that petitioner was accorded a complete review in keeping with the controlling decisions on that subject.

On a like footing is petitioner's contention (Pet. 11-14) to the effect that the opinion below is in conflict with the decisions of other circuit courts of appeals in cases cited by petitioner. Those cases deal with the general rule relating to the evaluation and weight to be accorded to circumstantial evidence. Petitioner's quarrel is, again, not with the law as enunciated by the court below (R. 35-36), which clearly conforms to the recognized rule (see, e. g., *Kassin v. United States*, 87 F. (2d) 183, 184, cited by petitioner), but with its application to the facts in this case. The same can be said of petitioner's last "proposition" (Pet. 14-16).

upon premises leased by petitioner and occupied by his fiancée, Government agents found various supplies for distillation purposes, an unlicensed still containing mash, and a sizable quantity of nontaxpaid whiskey, as well as petitioner's automobile containing his clothing and sacks of sugar. In addition, it was shown that petitioner, although not constantly present on these premises, was upon them part of the time. In these circumstances the presence of illegal distilling apparatus upon premises ostensibly under the control of petitioner furnished a clearly sufficient basis for submission of the case to the jury and warranted the denial of petitioner's motion for a directed verdict.

Although in defense the testimony of petitioner and other witnesses, if credited by the jury, would have tended to establish that petitioner was not a participant in the illegal activities to which defendant Cabe confessed, that petitioner had leased the premises to Cabe, and that his presence upon them on occasion and the presence of his personal property and the sugar in his car were all unrelated to the presence and operation of the still, the conduct of a distilling business, and the presence of nontax-paid liquor in the house, the jury, as was its province, chose to disbelieve this testimony and to accept all of the facts established by the Government as indicative of petitioner's guilt. Considering the evidence which the jury chose to credit, it cannot be said that its verdict is not predicated upon a substantial evidentiary basis.

Petitioner's assertion in effect that on the basis of applicable principles relative to conviction upon circumstantial evidence the facts in this case cannot support a verdict of guilty, is likewise without substance. The rule as to circumstantial evidence is, in effect, that where guilt depends upon such evidence, the evidence, considered *in toto*, must be inconsistent with the theory of innocence, or, as sometimes stated, exclude every reasonable hypothesis except that of guilt.<sup>2</sup> This means, we believe, no more than that a jury should not be allowed to speculate as to a defendant's guilt in a case where the circumstantial evidence, considered as a whole, does not clearly point toward guilt. The rule does not require the exclusion of every hypothesis or possibility of innocence, but only any fair and rational hypothesis except that of guilt. Nothing in the rule prevents the jury's finding guilt entirely upon circumstantial evidence; and the requirement of proof beyond a reasonable doubt operates on the whole case and not upon separate bits of evidence. Tested by these principles, the evidence here amply justifies the jury's verdict as to petitioner. The jury had before it not only the fact that petitioner had leased the premises, that he was present upon them on

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<sup>2</sup> This is the rule stated in cases upon which petitioner relies. See, e. g., *Stutz v. United States*, 47 F. (2d) 1029 (C. C. A. 5), *Kassin v. United States*, 87 F. (2d) 183, 184 (C. C. A. 5).

occasion after the still had been installed, and that his car was there at the time of the seizure, but also petitioner's prior convictions for internal revenue and liquor law violations.<sup>4</sup>

#### CONCLUSION

This case does not present any question of law of general importance, nor is there any real conflict with decisions of other circuit courts of appeals or of this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,  
*Solicitor General.*

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*Assistant Attorney General.*

ROBERT S. ERDAHL,  
WILLIAM STRONG,  
*Attorneys.*

JANUARY 1945.

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<sup>4</sup> It is obvious, of course, contrary to petitioner's implied contention (Pet. 12, 15), that he was not convicted upon the basis of knowledge by defendant Ives of the presence of the still and whiskey upon petitioner's premises, but was convicted upon the basis of a collocation of all the circumstances previously detailed and permissive inferences from them. Also, while there is no direct evidence that petitioner was upon the premises "while the still was in operation" (Pet. 15), the evidence does show that he was upon the premises after the still had been installed. And while Cabe testified that he did not use sugar in the manufacture of whiskey at the still, there is evidence that empty sugar sacks were found near the still. Both of these facts as shown by the record could properly be considered, as they probably were, by the jury in deciding petitioner's guilt.